

APPEAL NO. 031316
FILED JULY 8, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 24, 2003. The hearing officer determined that the respondent (claimant) had not sustained an injury in the course and scope of her employment on _____; that the claimant had failed to timely notify her employer of her claimed injury and did not have good cause for failing to do so; that the claimant had disability beginning August 23, 2002, and continuing to the date of the CCH; and that the respondent (carrier) waived its right to contest compensability by failing to timely dispute the injury in accordance with Section 409.021. The hearing officer's determinations on the injury, notice, and disability issues have not been appealed.

The carrier appeals the carrier waiver issue, contending that carrier waiver was not an issue at the benefit review conference (BRC); that it had properly and timely contested compensability by first filing a "cert 21" and subsequently disputing compensability in a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21); and that failure to pay benefits does not amount to a carrier waiver to contest compensability. Together with the carrier's appeal, the carrier filed five "Addendums." The claimant responded, urging affirmance of the carrier waiver issue and objecting to the addendums as evidence submitted for the first time on appeal.

DECISION

Affirmed.

The claimant alleged a right knee injury on _____, that she reported the injury that day, subsequently went on vacation, first saw a doctor on June 18, 2002, and was taken off work by another doctor on August 23, 2002. The hearing officer comments that she did not find the claimant credible, did not believe the claimant's knee injury occurred at work, and that the claimed knee injury was not timely reported. The carrier nonetheless had waived its right to contest ("dispute") compensability of the claim.

The pertinent facts regarding the waiver issue are that the carrier's first written notice of injury was received on October 15, 2002; that the carrier filed a "cert 21" (actually a TWCC-21 stating that the "Carrier will pay benefits as required by Workers' Compensation Act when a benefit accrues") on October 18, 2002 (receipt by the Texas Workers' Compensation Commission (Commission) was acknowledged on October 18, 2002); and that subsequently it filed a second TWCC-21 contesting compensability on October 31, 2002. The hearing officer notes that at the time the carrier filed the "cert 21" benefits had already accrued and that no benefits "have been paid in this claim,"

and that the carrier had not complied with its own stated intentions. The claimant alleged that she never received either the “cert 21” or the October 31, 2002, TWCC-21. The hearing officer made a determination that “[t]he Carrier did not send a copy of the “cert 21” or the TWCC-21 to the Claimant, and the Carrier has not paid any income or medical benefits as a result of this alleged injury.”

The carrier, on appeal, first alleges that carrier waiver under Section 409.021 was “first posed...at the April 24, 2003 [CCH], thus preventing the carrier from presenting evidence to document its position.” This contention is patently wrong as the BRC report clearly lists carrier waiver under Section 409.021 as an issue, and the benefit review officer’s recommendation was that the carrier had waived the right to dispute compensability of the claimed injury. Contrary to the carrier’s contention, the claimant was under no obligation to respond to the BRC report. We further note that at the beginning of the CCH, the carrier agreed that carrier waiver under Section 409.021 was an issue and there was a discussion of the various TWCC-21s.

There appeared to be some misunderstanding at the CCH on exactly what Section 409.021 says. Section 409.021 states:

- (a) An insurance carrier shall initiate compensation under this subtitle promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:
 - (1) begin the payment of benefits as required by this subtitle; or
 - (2) notify the commission and the employee in writing of its refusal to pay and advise the employee of:
 - (A) the right to request a benefit review conference; and
 - (B) the means to obtain additional information from the commission.
- (b) An insurance carrier shall notify the commission in writing of the initiation of income or death benefit payments in the manner prescribed by commission rules.

The Texas Supreme Court in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) had interpreted that provision to mean that:

carrier that fails to begin benefit payments as required by the [1989 Act] or send notice of refusal to pay within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability.

See also Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003.

We agree that the carrier timely filed its "cert 21" on October 18, 2002. We would also note that pursuant to Section 409.021(b) there is no requirement that a carrier give written notification to the claimant when the carrier agrees to accept the claimed injury and pay benefits as they accrue. See Texas Workers' Compensation Commission Appeal No. 030697, decided April 30, 2003; Texas Workers' Compensation Commission Appeal No. 030768-s, decided May 8, 2003.

The carrier, on appeal, argues that failure to pay accrued benefits as agreed does not amount to a waiver of the right to dispute compensability and that the filing of the "cert 21" allowed the carrier "an unfettered basis to deny compensability for up to sixty days," citing Texas Workers' Compensation Commission Appeal No. 022375-s, decided October 31, 2002. We would also note that Appeal No. 022375-s stands for the proposition that where the carrier has filed a "cert 21," or agreed to pay benefits, it may have 60 days to subsequently deny the claim but the carrier will be liable for benefits that have accrued to the claimant prior to the time that a notice of denial of the claim is filed.

The basis of our affirmance of the hearing officer's decision is that the carrier failed to notify the claimant in writing of its refusal to pay pursuant to Section 409.021(a)(2)(A) and (B). The carrier contends that it did send such notice to the claimant but by terms of its appeal it conceded that at least the initial notification was sent to "an invalid address." In any event whether the carrier provided the required notice to the claimant was a question of fact for the hearing officer to resolve. The hearing officer did so by determination that the TWCC-21 denying the claim was not sent to the claimant. That determination is supported by the evidence and we have no basis to disturb that determination on appeal.

The carrier attached five addendums to its appeal. All the addendums but one consist of documents dated in 2002, which would have reasonably been available at the CCH. One addendum is an affidavit, although dated May 2003, of an individual apparently known to the parties prior to the date of the CCH. We do not normally consider evidence submitted for the first time on appeal. See Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ) for the standard under which we might require a remand. We do not find a remand to be warranted under the referenced standard.

For the reasons stated we affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Chris Cowan
Appeals Judge